



May 4, 2021

Washington Utilities and Transportation Commission
621 Woodland Square Loop SE
Lacey, WA 98503

VIA UTC WEB PORTAL

RE: Docket No. UE-210241: Letter re UTC Request to Initiate Investigation into Prudency of Colstrip Operations

Dear Chairman Danner, Commissioner Rendahl and Commissioner Balasbas:

Sierra Club, Vashon Climate Action Group, 350 Seattle, NW Energy Coalition, the Washington Environmental Council and Climate Solutions write the Washington Utilities and Transportation Commission (“UTC” or “Commission”) in response to the UTC’s request for comments on whether it should initiate an investigation into the prudency of Colstrip operations at this time. The Commission cited the ongoing arbitration proceedings involving Colstrip as one reason it is “concerned whether a complex investigation is appropriate at this juncture.”¹

Our organizations believe that such an investigation is warranted as soon as possible, as we will outline below.

I. INTRODUCTION

The Colstrip coal plant in Colstrip, Montana is among the most complicated coal plants in the country, with four different boilers split up unevenly among six different owners operating in five different states. No company owns a majority share of Colstrip. This ownership structure makes it harder to achieve economic and environmental accountability.

The Commission has an affirmative role to play to protect the interests of Washington customers and the Washington Colstrip owners. Regardless of what happens with outside factors

¹ Notice of Opportunity to Respond to Request for Investigation at 1, Docket No. UE-210241 (Apr. 13, 2021), available at <https://apiproxy.utc.wa.gov/cases/GetDocument?docID=5&year=2021&docketNumber=210241>.

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like arbitration or legislation, continued controversy is likely and puts Washington ratepayers at risk. Because Colstrip is also no longer the least cost resource currently available, the Commission needs to step in and investigate whether continued funding of the plant by its Washington owners is prudent. While the Clean Energy Transformation Act (“CETA”) calls for the end of coal-based power in Washington State by the end of 2025, Washington customers should not continue to pay for a more expensive resource even right now, and ratepayers deserve a clear exit plan from all Colstrip owners.

II. THE COLSTRIP PLANT IS UNECONOMIC AND CONTINUING OPERATIONS IS IMPRUDENT AND HARMFUL TO WASHINGTON UTILITIES AND RATEPAYERS

There is a consensus among Colstrip owners in the Pacific Northwest that the Colstrip plant is no longer economic. PacifiCorp is planning to withdraw all coal-based resources for its Washington service territory by 2023.² A 2020 study from Portland General Electric, Oregon’s Colstrip owner, also concluded that withdrawing from Colstrip in the nearterm was the most fiscally responsible decision.³ And Avista’s 2021 draft IRP from Idaho states that “the [Colstrip] plant was determined by the model to be economic to exit in 2022.”⁴ In Avista’s previous rate case, they also agreed to accelerate the Colstrip depreciation schedule from 2034-36 for units 3 and 4, to 2025 and agreed not to make capital investments that would extend the life of those units beyond the end of 2025.⁵

In Puget Sound Energy’s (“PSE”) recent UTC proceeding in which they sought approval to “sell” their 25% share of Colstrip Unit 4 and transmission assets to NorthWestern in exchange for a disadvantageous power purchase agreement, testimony – **including the testimony of Puget Sound Energy itself**⁶ – revealed that Colstrip units 3 and 4 are currently uneconomic for

² Steve Ernst, *Settlement Would Depreciate Pacificorps’ Depreciation on Coal Units*, Clearing Up, July 24, 2020, available at

https://www.newsdata.com/clearing-up/courts-and-commissions/settlement-would-accelerate-pacificorps-depreciation-on-coal-units/article_da24456c-cdf4-11ea-b37a-23e13d5fc8f1.html [hereinafter “*Settlement Would Depreciate Pacificorps’ Depreciation on Coal Units*”].

³ Puget Sound Energy, *Colstrip Enabling Study* at 14 (July 7, 2020), available at <https://assets.ctfassets.net/416ywc1laqmd/2AK9jf4GCmd1tyaLA8EODE/fb40144334f40fab7cc2e001676f1977/2020-colstrip-enabling-study.pdf> (“Results from the portfolio analysis consistently suggest that the acceleration of Colstrip’s removal from PGE’s portfolio lowers long term costs.”).

⁴ Avista, *2021 Electric Integrated Resource Plan* at 12-25 (Apr. 1, 2021), available at <https://www.myavista.com/-/media/myavista/content-documents/about-us/our-company/irp-documents/2021-electric-irp-w-cover-updated.pdf>.

⁵ *Settlement Would Depreciate Pacificorps’ Depreciation on Coal Units*, *supra* note 2.

⁶ See, e.g., Exh. RJR-5C, Fourth Exhibit (Confidential) to the Prefiled Direct Testimony of Ronald Roberts at 22, Docket No. UE-200115 (Wash. Utils. & Transp. Comm’n Feb. 19, 2020), available at

<https://apiproxy.utc.wa.gov/cases/GetDocument?docID=114&year=2020&docketNumber=200115> (“Based on the declining economics of Colstrip units 3 and 4...”); See also Exh. ASR-1CT, Testimony of Andrew S. Rector at 11, Docket No. UE-200115 (Wash. Utils. & Transp. Comm’n Oct. 2, 2020), available at

<https://apiproxy.utc.wa.gov/cases/GetDocument?docID=917&year=2020&docketNumber=2001>

Washington ratepayers. While the transaction was withdrawn and the UTC did not get to weigh in, this testimony provides part of the basis to open a new investigation about the economics of Colstrip.⁷

Admissions made by each of the Washington Colstrip co-owners indicate that the Colstrip plant is not currently economic.

III. MONTANA HISTORY AND OWNERSHIP OF COLSTRIP

The interests of Washington utilities and their customers diverge from those of Colstrip's Montana owner, NorthWestern Energy ("NorthWestern" or "NWE"). NorthWestern owns 30% of shares in Colstrip Unit 4.⁸ NorthWestern purchased these shares in 2007 with shareholder money for \$187 million, and then, in 2008, persuaded the Montana Public Service Commission to allow them to sell their shares from their shareholders to their ratepayers for an inflated \$407 million.⁹

15 (citing the possibility that absent the transactions Colstrip owners acknowledge the units may shut down).

⁷ See, e.g., Exh. EDH-1CT, Direct Testimony of Ezra D. Hausman at 13, Docket No. UE-200115 (Wash. Utils. & Transp. Comm'n Oct. 2, 2020), available at <https://apiproxy.utc.wa.gov/cases/GetDocument?docID=1031&year=2020&docketNumber=200115> [hereinafter "Hausman Direct"]. PSE ultimately withdrew the transaction with universal opposition to it, including Staff's recommendation that the Commission not approve it due to the PPA and asset sale not being the least cost way to meet the obligations of CETA. See, e.g., Hal Bernton, *Deal falls through to sell Puget Sound Energy's stake in Montana's Colstrip coal plant*, Seattle Times, Oct. 29, 2020, available at <https://www.seattletimes.com/seattle-news/deal-falls-through-to-sell-puget-sound-energys-stake-in-montanas-colstrip-coal-plant/> [hereinafter "*Colstrip Deal Falls Through*"]; *UTC Staff recommend denying PSE's request to sell Unit 4 interests*, Wash. Utils. & Transp. Comm'n (Oct. 5, 2020), available at <https://www.utc.wa.gov/news/2020/utc-staff-recommend-denying-pses-request-sell-colstrip-unit-4-interests>.

⁸ Marcy Crane, *Talen Energy plans to hike its ownership interest in Colstrip coal-fired plant*, S&P Global, Apr. 11, 2020, available at <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/talen-energy-plans-to-hike-its-ownership-interest-in-colstrip-coal-fired-plant-57999752>.

⁹ Order No. 6925f at 24, 51-52, Docket No. D2008.6.69 (Mont. Pub. Serv. Comm'n Nov. 13, 2008), available at <https://fnds.mt.gov/PSC/document?params=U2FsdGVkX19uiVGaT9YnCb7cqDytWO0mr6UfiO0zRLoA39mOqz53KYc2h8rwI43B%2ByWswaoOIDKXbrbeWVdCcI8F6Hwt%2B4ph0bobCFbkPnDxsnrFEXeMAz2UqeDva%2B%2FrEjdV0ZvLpKC7tLQdtRNzPg%3D%3D>. As a result of this, NorthWestern collects inflated capital costs through its rate base, and intends to continue doing so until the rate-based amount is fully depreciated in 2042. Indeed, recent attempts by NorthWestern to acquire more of Unit 4 suggest that NorthWestern is interested in continuing to operate Colstrip well past the end of its economic life in order to maximize its own revenue. See S.B. 278, 66th Leg., Reg. Sess. (Mont. 2019) (died in Standing Comm.); Anne Hedges, *Three Strikes and NorthWestern Energy is Out on Colstrip Purchase*, MEIC, <https://meic.org/three-strikes-and-northwestern-energy-is-out-on-colstrip-purchase/> (last accessed May 4, 2021); S.B. 331, 66th Leg., Reg. Sess. (Mont. 2019) (died in chamber); *Colstrip Deal Falls Through*, *supra* note 7.

In the recently concluded Legislative session, the Montana legislature attempted to further NorthWestern's corporate interests at the expense of both Washington and Montana ratepayers through various pieces of legislation.¹⁰ SB266 and SB265, just signed by the Governor, attempt to regulate Colstrip budgets, closure and arbitration, although the existing Ownership & Operations Agreement signed by the co-owners governs all of these issues and would appear to foreclose legislative control of these matters.¹¹ The Washington and Oregon Colstrip owners filed suit today to challenge SB 265.¹²

Montana legislation benefitting Montana companies at the expense of out-of-state owners and consumers should not determine the future for Washington's ratepayers.

IV. WASHINGTON RATEPAYERS ARE HARMED BY COLSTRIP'S CONTINUED OPERATION

If successful, NorthWestern's attempts to prolong operation of Colstrip will harm Washington ratepayers. First, the imprudent decisions of NorthWestern Energy impose unjust and unreasonable risks and expenses on Washington's ratepayers and utilities. Second, the combined actions of NorthWestern and Montana's legislature ignore the scientific consensus regarding the threat posed by global climate change. Washington is committed to a speedy reduction in greenhouse gas emissions through the incremental phasing out of fossil fuels within the power sector.¹³ Washington's utilities, in their efforts to comply with Washington law and policy designed to combat the climate change threat, are being placed in a compromising position by the recalcitrance of NorthWestern Energy, which seeks to prevent Washington's utilities from exiting Colstrip even though they will no longer be able to sell the power being produced there to ratepayers in their Washington service territories.

¹⁰ S.B. 379, 67th Leg., Reg. Sess. (Mont. 2021) (died in chamber). See Mike Dennison, *NW Energy/Colstrip Bill Ignites Fiery Comments -- Again*, KTVH, Apr. 15, 2021, available at <https://www.ktvh.com/news/montana-politics/nw-energy-colstrip-bill-ignites-fiery-comments-again>.

¹¹ Tom Lutey, *Montana Blasts "woke" Washington with new laws to extend coal power*, Billings Gazette, May 3, 2021, available at https://billingsgazette.com/news/state-and-regional/govt-and-politics/montana-blasts-woke-washington-with-new-laws-to-extend-coal-power/article_33f149b7-1ccc-5617-b745-4e5f891f1f16.html#tracking-source=home-top-story-1; S.B. 266, 67th Leg., Reg. Sess. (Mont. 2021) (enacted) and S.B. 265 67th Leg., Reg. Sess. (Mont. 2021) (enacted). SB379, though tabled, would have enabled NorthWestern to run Colstrip in perpetuity while fleecing Montana ratepayers to benefit NorthWestern. See S.B. 379, 67th Leg., Reg. Sess. (Mont. 2021) (died in chamber). See Mike Dennison, *NW Energy/Colstrip Bill Ignites Fiery Comments -- Again*, KTVH, Apr. 15, 2021, available at <https://www.ktvh.com/news/montana-politics/nw-energy-colstrip-bill-ignites-fiery-comments-again>.

¹² *Plant owners say new law interferes with Colstrip contract*, The Telegraph, May 4 2021, available at <https://www.thetelegraph.com/news/article/Plant-owners-say-new-law-interferes-in-Colstrip-16151017.php>; Complaint (Declaratory Brief), No. 1:21-cv-00047-SPW-KLD (D. Mont. May 4, 2021).

¹³ Wash. Rev. Code § 19.405.010(2) (2019) ("It is the policy of the state to eliminate coal-fired electricity, transition the state's electricity supply to one hundred percent carbon-neutral by 2030, and one hundred percent carbon-free by 2045.").

V. THE COLSTRIP OWNERSHIP & OPERATIONS AGREEMENT ALLOWS FOR A UTILITY COMMISSION ORDER TO BRING AN END TO COLSTRIP NOW

The Colstrip Ownership & Operations Agreement—the agreement that governs Colstrip budgets, repairs, and other such matters—states that “[w]hen the Project can no longer be made capable of producing electricity consistent with Prudent Utility Practice or the requirements of governmental agencies having jurisdiction . . . Operator shall sell all salable parts of the portion of the Project being removed from service”¹⁴ A plain reading of this language makes clear that, should a “governmental agenc[y] having jurisdiction” (i.e., the Washington Utilities & Transportation Commission) declare the production of power from Colstrip is inconsistent with prudent utility practice or Commission requirements, it will trigger Section 31, which would facilitate the utilities’ exit from Colstrip and the closure of the plant. Thus, in exercising its lawful oversight of Washington utilities’ decisions and expenditures, the UTC independently holds the power to bring about the end of Colstrip.

VI. THE UTC HAS THE POWER TO ISSUE AN ORDER OR FINDING THAT COLSTRIP CANNOT PRODUCE POWER CONSISTENT WITH PRUDENT UTILITY PRACTICE

A. Colstrip is no longer “used and useful” because it is “technologically and economically obsolete”

The utility ratemaking concept of “used and useful” exists to ensure that “investments that are no longer used and useful to the public because they are either technologically or economically obsolete can be excluded from the rate base.”¹⁵ Colstrip right now fails to meet the test for rate recovery because it is technologically and economically defunct, and thus should not be included in the rate base.¹⁶

Under the Colstrip Ownership & Operations Agreement, the parties are expected to behave in accordance with “Prudent Utility Practice.” Prudent Utility Practices, according to Subsection 1(r) of the Agreement, are those which “in the exercise of reasonable judgement in the light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at the lowest reasonable cost consistent with reliability, safety and expedition.”¹⁷ Continuing to operate an uneconomic plant is, by logical necessity, not the lowest cost method for providing safe and reliable service.

¹⁴ See Colstrip Ownership & Operations Agreement: Units #3 and #4 at 30 § 31, End of Project [hereinafter “Colstrip Agreement”].

¹⁵ See Hausman Direct, *supra* note 7, at 13 (quoting Kenneth Rose, Electric Power: Traditional Monopoly Franchise Regulation and Rate Making, Encyclopedia of Energy 289, 293 (2004).

¹⁶ See, e.g., *id.* at 5 (“PSE’s own analysis shows that Unit 4 is economically obsolete because it cannot compare with readily-available alternative sources of energy, such as market purchases. Because of this, Unit 4 (and by extension, Colstrip Unit 3) cannot be deemed ‘used and useful’ and should be excluded from the rate base.”); see also Exh. PLC-1HCT, Response Testimony of Paul L. Chernick at 6, Docket No. UE-200115 (Wash. Utils. & Transp. Comm’n Oct. 2, 2020), *available at*

<https://apiproxy.utc.wa.gov/cases/GetDocument?docID=1122&year=2020&docketNumber=200115> (“By PSE’s own analysis, the least-expensive option would be to replace 100 percent of the output of PSE’s share of Colstrip Unit 4 with market purchases of energy and capacity.”).

¹⁷ Colstrip Agreement, *supra* note 18, at 3 § 1(r).

A UTC investigation, building on testimony in the Colstrip Unit 4 sale proceeding (Docket No. UE-200115) and the co-owner admissions that Colstrip is not currently economic, would establish that Colstrip is technologically and economically obsolete.

B. The Commission Has Authority over Utility Budgets and Can Declare Colstrip Uneconomic

This Commission is authorized by Wash. Rev. Code §§ 80.04.300¹⁸ and 80.04.310¹⁹ to issue an order or finding that Colstrip is uneconomic. At minimum, these statutes give the Commission substantial control over public service company budgets and budgetary items. Wash. Rev. Code § 80.04.310 even authorizes the Commission to proactively intervene in the planning of expenditures or contracts to reject that item from the budget and block the associated arrangement from happening. The Commission is not limited to reactive regulation; it is authorized to regulate proactively, and should use that authority when necessary to protect the public interest and Washington’s citizens.

In the scenario at hand, issuing such an order or finding would protect Washington’s ratepayers from the imprudent decision to continue operations at Colstrip beyond its economic life, as well as further the State of Washington’s commitments to reduce greenhouse gas emissions and combat climate change.²⁰

This investigation and, if warranted, a subsequent UTC order would trigger the Section 31 End of Project provisions in the Ownership & Operations Agreement to bring about an end to Colstrip, while utilizing the general principles of ratemaking. This action would end the uncertainty resulting from the Montana legislative actions and arbitration and would serve to protect Washington ratepayers.

VII. THE COLSTRIP ARBITRATION REINFORCES THE NEED FOR A UTC COLSTRIP INVESTIGATION

A UTC investigation is essential to position the UTC to protect Washington ratepayers. As the UTC itself acknowledges when asking whether to open a Colstrip investigation, the Colstrip co-owners are currently in arbitration regarding the future of Colstrip.²¹ While this arbitration is taking place behind closed doors without public input, the decisions made in the dispute will impact Washington utilities and ratepayers, and potentially even lead to further litigation. The outcome of the arbitration is, of course, uncertain. Newly enacted Montana

¹⁸ “**Budgets to be filed by companies—Supplementary budgets.** The commission may regulate, restrict, and control the budgets of expenditures of public service companies. . . .”

¹⁹ “**Commission’s control over expenditures.** The commission may, both as to original and supplementary budgets, prior to the making or contracting for the expenditure of any item therein, and after notice to the company and a hearing thereon, reject any item of the budget. The commission may require any company to furnish further information, data, or detail as to any proposed item of expenditure. . . . Examination, investigation, and determination of the budget by the commission shall not bar or estop it from later determining whether any of the expenditures made thereunder are fair, reasonable, and commensurate with the service, material, supplies, or equipment received.”

²⁰ See Clean Energy Transformation Act, Wash. Rev. Code § 19.405.010 (2019).

²¹ Tom Lutey, *Lawmakers Take Up Fight over Colstrip Repairs*, Billings Gazette, Feb. 24, 2021, available at https://billingsgazette.com/news/state-and-regional/govt-and-politics/lawmakers-take-up-fight-over-colstrip-repairs/article_b6d44eb3-ef29-57d2-afe0-ac837cc08051.html.

legislation that attempts to influence or control the arbitration increases the uncertainty and risk to Washington ratepayers.²²

In short, the pending arbitration only heightens the need for UTC action. This Commission has the authority and responsibility to set its own standards to protect Washington ratepayers and ensure compliance with Washington law (i.e., CETA). The pending arbitration therefore should not be viewed as a barrier to Commission action and, if anything, an independent reason why this proceeding is necessary to protect Washington consumers.

VIII. UTC INVESTIGATION IS TIMELY AND NECESSARY

The Commission is empowered to protect Washington ratepayers. The recent attempts to pass legislation in Montana that would prolong costly operations at Colstrip (as well as the ongoing arbitration) should be viewed as a call to action. It is essential for the Commission to act quickly and proactively to protect the public interest and Washington ratepayers. The traditional tools of ratemaking principles enable the Commission to take definitive action to prevent decisions being made in Montana from negatively impacting ratepayers and communities in Washington.

The Commission should act immediately to initiate an investigation into the prudence of continuing any operations at Colstrip Units 3 & 4 to determine whether expenses associated with the continued operation of the Colstrip facilities are even eligible to be added to the rate base.

Sincerely,

/s/ Jessica Yarnall Loarie
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Senior Attorney
Sierra Club

/s/ Kevin Jones
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Board Member
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/s/ David Perk
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cc: Lisa Gafkin, Public Counsel Chief, Office of the Attorney General

²² The bills themselves may also be subject to legal challenge.